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Federal Communications Commission
Office of Secretary

In the Matter of)

Amendment of Part 1 of the Commission's
Rules — Competitive Bidding)

WT Docket No. 97-82

Broadband PCS C and F
Block Payment Issues)

DA 97-679

To: The Commission

COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION

Walter H. Alford
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

David G. Frolio
David G. Richards
1133 21st Street, N.W.
Washington, DC 20036
(202) 463-4182

Its Attorneys

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SUMMARY

The Commission must not change the economic bargain struck by C and F block licensees in the auction — and especially must not reward imprudent and speculative bidders by granting them relief from their obligations. In many cases, responsible bidders were deprived of the opportunity to acquire licenses because they were outbid by these “winning” bidders. Last year, when Chairman Hundt heard that some C block bidders believed that the Commission would lighten their payment load, his response was “Forget about it!” That was the right response then, and it remains so today.

All bidders were aware that if they won, they would have to pay their net bid price or forfeit the license and pay a penalty. The Commission made clear that it would strictly enforce its rules dealing with payment obligations, in order to maintain the integrity of the auction process. The Commission must not grant a windfall to irresponsible bidders and penalize those who bid rationally and played by the rules. All bidders run the risk that they might bid too high; that risk cannot be shifted to the Government. If the Commission does not take a firm position here against after-the-fact bail-outs and giveaways at taxpayer expense, it will never again be able to conduct an auction in which participants know the rules in advance.

BellSouth has no objection to economically-neutral changes in payment arrangements that were not set by rule in advance of the auction. Thus, for example, BellSouth does not object to modifying the frequency of payments, if done in a way that does not change the fundamental economic bargain struck at the auction. The changes proposed by MCI, Fortunet, and GWI are another matter.

The Commission cannot lawfully grant the relief sought by MCI, Fortunet, and GWI because Title 31 of the U.S. Code bars the Commission from compromising any claim owed to the Treasury exceeding \$100,000. Under Title 31, the Commission has a duty to the U.S. taxpayer to collect the claims that are owed when they are owed. The Commission may not even suspend a payment obligation. Congress never authorized the Commission to waive or postpone auction revenue once the licenses are granted and the licensee has become obligated.

Fundamental fairness and due process of law are essential when the Commission resolves “conflicting private claims to a valuable privilege,” as in an auction. The Commission must give clear notice of its rules in advance and must follow them. Here, the FCC established rules that went to the core of the auction process, including the rules regarding installment payments and defaults, and said it intended to enforce those rules strictly. The licensees received conditional licenses, which are automatically forfeited if such rules are not complied with. Fundamental fairness requires the Commission to follow those rules. The existing installment payment plans were carefully crafted to provide reasonable assistance to entrepreneurs of various sizes without encouraging speculation. The Commission should do no more. Changing the payment plan after the auction in a way that alters the fundamental economic bargain that came out of the bidding would amount to cutting the prices after the auction.

The Commission may not grant the relief sought by MCI, Fortunet, and GWI through waivers. Such “waivers” would undermine the integrity of the auction process by directly changing

the economic bargains that resulted from the auctions. After-the-fact waivers of this kind are discriminatory *per se*. Deviations from evenhandedness relating to the economic terms of the auction have the effect of subsidizing one competitor over another and would directly penalize those who relied upon the rules as they stood prior to and at the time of the PCS auctions.

Clearly, the Commission cannot and should not vitiate its rules through broad-scale waivers as a matter of law. BellSouth agrees with Cook Inlet that “strict policies under the rules will deter future speculative excesses by licensees eligible for the auction installment loan program.” BellSouth also agrees with Cook Inlet that the Commission should immediately end its suspension of the deadline for installment payments and restore all payment obligations.

The Commission may not grant the MCI/Fortunet/GWI requests by retroactively changing its rules, either. *Bowen v. Georgetown University Hospital* establishes that retroactive rulemaking by an agency is prohibited absent an express grant by Congress to the agency of such authority. Here, the Commission lacks such authority. The requests, if granted, would substantively change the outcome of the auction after the auction has taken place and after the licenses have been issued. If the FCC were to act on the proposed rule changes after the auction, it would, therefore, be undermining the premises on which the auctions were based and engaging in retroactive rulemaking. BellSouth agrees with Cook Inlet that the Commission should initiate a notice and comment rulemaking to address *prospectively* certain issues concerned with installment payments that are not addressed by the current rules or that do not affect the economic bargain established by the auction.

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To: The Commission

COMMENTS OF BELL SOUTH

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits its comments in response to the Wireless Telecommunications Bureau's Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues*, WT Docket 97-82, DA 97-679 (June 2, 1997) (*Public Notice*). The *Public Notice* sought comment on a variety of requests for relief from the installment payment obligations of C and F block licensees and related proposals.

The Commission must not change the economic bargain struck by C and F block licensees in the auction — and especially must not reward imprudent and speculative bidders by granting them relief from their obligations. In many cases, responsible bidders were deprived of the opportunity to acquire licenses because they were outbid by these "winning" bidders. Several of the proposals put out for comment would grant windfalls to these speculators by letting them keep their licenses and pay less than other, more responsible, bidders were willing to pay.

All bidders were aware that if they won, they would have to pay their bid price in accordance with the rules or forfeit the license and pay a penalty. All bidders, likewise, had clear notice that the Commission would strictly enforce its rules dealing with payment obligations, in order to maintain the integrity of the auction process. The Commission must not now, after the fact, grant a windfall to irresponsible, speculative bidders and penalize those who bid rationally and dropped out when prices became too high. Moreover, some of the proposed rule changes would benefit large foreign companies seeking to acquire interests in licenses at cut-rate prices, while penalizing American companies who complied with the rules.

The *Public Notice* seeks comment on the following:

- Proposals to modify the frequency of payment for C and F block installment payments from quarterly to annual, submitted by several C and F block licensees;¹
- Proposals for “alternative financing arrangements” and other changes in the requirements applicable to C and F block licensees, submitted by MCI and Fortunet;²
- A petition for rulemaking concerning C and F block installment payment obligations, filed by Cook Inlet;³
- An informal proposal by General Wireless for reduction of the principal amount of its installment debt and related issues;⁴ and

¹ Appendix A to the *Public Notice* contains a March 13, 1997 letter from counsel for Alpine PCS, Inc.; DCR PCS, Inc.; Eldorado Communications, L.L.C.; Indus, Inc.; KMTel L.L.C.; Mercury PCS, L.L.C.; Microcom Associates; NextWave Communications, Inc.; and R&S PCS, Inc. to the Chief, Wireless Telecommunications Bureau (“Gutierrez Letter”).

² Appendixes B and C to the *Public Notice* contain, respectively, a letter from Leonard S. Sawicki, Director, FCC Affairs, MCI Telecommunications Corporation, to the Secretary (May 1, 1997) (“Sawicki Letter”), and a letter from James H. Barker and Michael S. Wroblewski, Counsel to Fortunet Communications, L.P., to the Secretary (May 9, 1997) (“Barker Letter”).

³ Appendix D to the *Public Notice* contains a petition for rulemaking, RM-9093, filed May 7, 1997 by Cook Inlet Region, Inc. (“Cook Inlet Petition”).

⁴ Appendix E to the *Public Notice* contains slides describing a May 6, 1997 proposal by General Wireless, Inc. (“GWI Proposal”).

- Requests from various C and F block licensees who made timely installment payments prior to the Commission's suspension of payment obligations, concerning credit for the time value of the payments they made.⁵

In response to these submissions, the Commission has asked for comment on "which options would be most appropriate for a restructuring of broadband PCS C and F block debt."⁶ As shown herein, BellSouth believes that implementation of the requested changes through rule waivers is contrary to law and the public interest. Moreover, the Commission can consider granting only limited forms of relief through rulemaking, due to its lack of statutory authorization to engage in retroactive rulemaking.

INTRODUCTION

"Forget about it." That's how Chairman Hundt responded last year to the suggestion that the FCC might, after the auction, give C block bidders a break on their payment obligations.⁷ The Chairman got it 100% right.⁸ Changing the basic economic terms on which an auction was conducted after the close of the auction — particularly the obligation of the winning bidders to pay

⁵ Appendixes F-H to the *Public Notice* contain, respectively, an April 7, 1997 letter from counsel for Southeast Wireless Communications, L.P., to the Office of Managing Director ("SWC Letter"), an April 4, 1997 letter from counsel for Comtel PCS Mainstreet Limited Partnership to the Auctions Division ("Comtel Letter"), and an April 2, 1997 letter from counsel for Americall International LLC to the Office of Managing Director ("Americall Letter").

⁶ *Public Notice* at 2.

⁷ Speech by Chairman Reed E. Hundt, "To Loop or not to Loop: Is that the Question?", before the Cellular Telecommunications Industry Association (March 26, 1996), <<http://www.fcc.gov/Speeches/Hundt/spreh613.txt>> ("I am also concerned about the level of the bidding in the C block auction. I'm indifferent to the prices: people are bidding of their own free will. But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over, and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: *Forget about it.*") (emphasis added).

⁸ Recently, the Chairman was more willing to grant concessions to auction winners, even though he continues to maintain that the Commission should "tolerate" the fact that some licensees may "crash and burn in the fast lanes of competition." Speech by Chairman Reed E. Hundt to Citizens for a Sound Economy, "Spectrum Policy and Auctions: What's Right, What's Left," at 5 (June 18, 1997), <<http://www.fcc.gov/Speeches/Hundt/spreh734.html>>.

the net bid price in accordance with the established terms — destroys the integrity of this and future auctions and rewards speculative behavior.

Spectrum auctions are a means for ensuring that valuable licenses go to those who value them most highly. Bidders evaluate the spectrum rights being auctioned in light of the information available to them at the time of auction, and as the Chairman put it, they “bid[] of their own free will.”⁹ While rational bidders take into account their own proprietary information (*e.g.*, business plans, access to funds, and technical secrets), they also rely on public information shared in common with all potential bidders, such as the rules governing the conduct of the auction, the use of the spectrum, and the payment terms. This public information defines the bundle of spectrum rights and economic obligations that are being auctioned and directly affects bidders’ valuation of the licenses being auctioned. Any significant change in this public information must be made in advance of the auction because it changes what is being auctioned and, by definition, affects bidders’ valuations, business plans, and bidding strategies and alters the outcome of the auction.

To change the premises of the auction *after* the auction has been completed destroys the integrity of the auction, as the full Commission has just recently stated:

[I]f we were to extend the deadline for NatTel here, we would be encouraging future bidders to submit last minute waiver requests in lieu of making their payments at the time their obligations become due, thereby impairing the integrity and functioning of the auction process. We also note that the integrity of the auction process is dependent on winning bidders timely satisfying their payment obligations. That such payments are timely made is an important and necessary indication to the Commission that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public.¹⁰

⁹ See note 7, *supra*.

¹⁰ *National Telecom PCS, Inc.*, FCC 97-192 at ¶ 14 (June 19, 1997).

Some bidders may discover, after the auction, that they have struck a bad bargain — they agreed to pay too much, or the hoped-for equipment isn't available, or market conditions have changed. In that case, they can pay the price in accordance with the established terms, including grace periods, sell in accordance with the Commission's unjust enrichment rules, or default and let the Commission reacquire the spectrum. What they cannot do is change their bargain retroactively, based on what they think the spectrum is worth in hindsight.

Any bidder runs the risk that its winning bid might be too high. That risk is assumed by the bidder and cannot be shifted to the Government. The Commission itself has so held:

Bidders who won . . . licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government. Grant of a waiver would do so by allowing them to avoid the financial obligations they willingly undertook when they applied to participate in the auction. The exercise of due diligence *prior* to participating in an auction is very much in the public interest and we wish to do nothing that would discourage such conduct.¹¹

The Commission has already taken any number of actions that have affected the valuation of PCS licenses after conducting the auctions. For example, after the PCS auctions, and after denying BellSouth a spectrum cap waiver for 500 kHz of SMR spectrum dedicated to data transmission and telling the company this rule was inviolate,¹² the Commission proceeded to create a new service, the Wireless Communications Service ("WCS"), which it exempted from the CMRS spectrum cap even though this spectrum is allowed to be used for service identical to cellular and PCS.¹³ In addition, the Commission has twice relieved NextWave of the consequences of non-

¹¹ *Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, 9 F.C.C.R. 6384, 6385 (CCB 1994), *recon.*, 10 F.C.C.R. 12,153 (1995).

¹² *Letter to Mr. John Beasley, BellSouth Corporation*, 11 F.C.C.R. 9970 (WTB Aug. 29, 1996).

¹³ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket 96-228, *Notice of Proposed Rule Making*, FCC 96-411 (November 12, 1996); *Report and Order*, FCC 97-50 (Feb. 19, 1997) (*WCS Order*), *recon.*, *Memorandum Opinion and Order*, FCC 97-112 (April 2, 1997), *further recon. pending*.

compliance with the rules. First it granted licenses to NextWave even though its ownership structure and financial arrangements did not comply with the Commission's well-established requirements, subject to the condition that the company be restructured to comply with the rules.¹⁴ Later, the Commission gave NextWave additional time to complete its restructuring, which may obviate some of the structural requirements that NextWave accepted by permitting NextWave to come under foreign ownership pursuant to an international agreement that becomes effective on January 1, 1998.¹⁵ If other companies had known at the time of the auction that they would simply be able to restructure, and not be disqualified or otherwise penalized for failing to comply with rules, their bidding strategies and ownership structures might have been different.¹⁶

While some of these actions¹⁷ have had an effect on the valuation of spectrum, and might have affected bidders' actions to some degree if known at the time of the auction, none of these actions *fundamentally* struck at the economic bargain entered into at auction. In fact, the Commission issued a warning that "the Commission's rules concerning default payments will be

¹⁴ *NextWave Personal Communications, Inc.*, DA 97-328 (WTB Feb. 14, 1997).

¹⁵ *NextWave Personal Communications, Inc.*, DA 97-1040 (WTB May 16, 1997).

¹⁶ In addition, the Commission waived its deadline for divestiture of Sprint's cellular interests, even though other similarly situated companies (including BellSouth) had complied with the rule to their detriment. *WirelessCo, L.P., PhillieCo, L.P., and Sprint Corp.*, 10 F.C.C.R. 11,111 (WTB Sept. 21, 1995).

¹⁷ See also *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket 96-59, *Report and Order*, 11 F.C.C.R. 7824, 7869 (1996) (modifying spectrum cap); *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-474 (Dec. 20, 1996) (eliminating limits on disaggregation and partitioning); *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8965 (1996) (allowing unrestricted fixed service).

strictly enforced in all auctions,”¹⁸ and it has consistently dealt harshly with auction participants who have failed to submit payments promptly.¹⁹

Now, however, the Commission has begun to change the fundamental economic bargains produced by the auctions — directly changing the net present value of the payment obligations owed to the U.S. Treasury by the C and F block licensees. The Commission took the first steps in this direction when it suspended the deadline for C and F block PCS licensees’ installment payments, pending consideration of requests to change the payment schedule from quarterly to annual.²⁰ The suspension of payment obligations directly affects the economic bargain entered into by these licensees, because they are not making the payments to the U.S. Treasury that they have agreed to make in exchange for their licenses.

The suspension of payments, in turn, prompted more substantial and fundamental requests to change the terms of C and F block licensees’ obligations, such as the MCI, Fortunet, and GWI filings. Instead of rejecting these requests summarily, the Commission put them out for comment and is planning to hold a public forum to discuss them.²¹ The fact that the Commission is apparently considering these requests seriously is a matter of grave concern. If the Commission does not take a firm position here against after-the-fact bail-outs and giveaways at taxpayer expense, it will never again be able to conduct an auction in which participants know the rules in advance.

¹⁸ Public Notice, *Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules*, DA 96-481 (April 4, 1996).

¹⁹ E.g., *BDPCS, Inc.*, 12 F.C.C.R. 3230 (1997); *National Telecom PCS, Inc.*, 11 F.C.C.R. 14,605 (WTB Nov. 12, 1996). The Commission has granted relief to bidders who are only a little late and had a good explanation, such as a lack of notice. E.g., *Longstreet Communications International, Inc.*, DA 97-257 (WTB Feb. 4, 1997); *Southern Communications Systems, Inc.*, 12 F.C.C.R. 1532 (WTB Feb. 4, 1997).

²⁰ *Installment Payments for PCS Licensees*, DA 97-649 (WTB March 31, 1997) (C block); Public Notice, DA 97-883 (April 28, 1997) (F block).

²¹ See Public Notice; see also Public Notice, DA 97-1267 (June 17, 1997).

BellSouth played by the rules. It entered into a partnership agreement with Cook Inlet that fully complied with the Commission's structural rules. The partnership evaluated the C and F block licenses in light of the installment payment rules that were in place and bid responsibly. Unfortunately, other bidders exhibited "irrational exuberance" and bid the prices up beyond reasonable levels. As a result, the Cook Inlet-BellSouth partnership won no licenses.

Now some have sought to change the rules in a way that would alter the net value of the winning bids. The Commission is asked, in effect, to let the winners pay less than other willing bidders would have paid before they were outbid. The Commission should say "forget about it" and firmly reject such requests.

DISCUSSION

I. BELLSOUTH HAS NO OBJECTION TO AN ECONOMICALLY NEUTRAL CHANGE FROM QUARTERLY TO ANNUAL INSTALLMENT PAYMENTS

BellSouth does not object to the Commission modifying the frequency of payments from quarterly to annual, provided that any change is accomplished in a manner that does not diminish the economic value to the U.S. Treasury of the stream of payments. The payment frequency is not currently set by rule, so a change would not require any rule change.²² The payment frequency was not established prior to auction, and is not, therefore, a fundamental component of the bargain arrived at through the auctions. Accordingly, a revenue-neutral change in payment frequency would not violate any rules, change the terms of the licenses, or constitute retroactive rulemaking.

²² Given that no specific payment frequency is required by rule, the renegotiation of a particular promissory note to change the payment frequency in an economically neutral manner would not require rulemaking. To the extent the Commission intends to adopt a generally applicable policy concerning the frequency of payments, however, rulemaking would be appropriate.

Moreover, if done on economically neutral terms, the modification of the payment frequency would not constitute a prohibited “compromise” of a debt owed to the U.S. Treasury.²³

II. THE COMMISSION MUST DENY THE MCI, FORTUNET, AND GWI REQUESTS

MCI, Fortunet, and GWI have asked the Commission to provide various forms of “relief” from Commission rules and legally binding financial obligations to the U.S. Treasury. These requests ask for no less than a multi-billion-dollar handout from the American taxpayer. They cannot be granted as a matter of law because they request the Commission to compromise valid and legally binding debts owed to the U.S. Treasury by the C and F block licensees, contrary to express statutory limits on the Commission’s authority. Moreover, granting these requests would vitiate the most fundamental rules and policies that apply to the conduct of an auction — the rules requiring payment of the auction price in accordance with established terms. Among the rules involved are Sections 24.711(b) (provisions concerning interest rate, term, and type of payments for C block installment payments), 24.716(b) (provisions concerning interest rate, term, and type of payments for F block installment payments), 1.2109(a) (grant of license conditioned on full payment), 1.2109(c) (failure to make required payments in timely manner constitutes default), and 1.2110(e) (general rules concerning installment payments and grace periods). The Commission does not have the authority — through waiver *or* rulemaking — to suspend licensees’ existing payment obligations and restructure their debt in such a way that the established rules are ignored or wiped off the books with respect to those who were bound by those rules.

²³ See 31 U.S.C. § 3711(a)(2).

A. The Commission Lacks Legal Authority to Change the Terms of Payment to the Detriment of the Government

Unlike the payment-frequency petitioners, MCI, Fortunet, and GWI seek to reduce the net present value of debt owed to the U.S. Treasury. Such relief is barred by Chapter 37 of Title 31 of the United States Code, which governs, *inter alia*, the collection and compromise of claims of the government, including debt owed to it.²⁴

Under this statutory scheme, the amount a C or F block licensee owes under the installment payment rules constitutes a “claim” or “debt,” which includes “any amount of funds . . . owed to the United States by a person.”²⁵ Under 31 U.S.C. § 3711, an agency such as the Commission is obliged to “try to collect a claim . . . arising out of the activities of . . . the agency.”²⁶ The Commission’s authority to “compromise” a claim — *i.e.*, modify the claim to the detriment of the government — is limited to claims with a principal amount not exceeding \$100,000.²⁷ Moreover, the Commission may “suspend or end collection action” on a claim only when the claim is for \$100,000 or less and “no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.”²⁸ Furthermore, before any delinquent debt is discharged, the Commission is obliged to “take all appropriate steps to collect such debt,” through referral to private debt collectors or federal debt

²⁴ Section 1.2110(e)(4), which defines when a licensee is in default on its installment payment obligations, states that the Commission will institute debt collection in accordance with Part 1, Subpart O; the latter rules are based on Title 31. *See* 47 C.F.R. Part 1, Subpart O, Authority statement. BellSouth notes that there have been extensive changes to Title 31 recently. Accordingly, the Commission may wish to review Subpart O of Title 1 to ensure that it remains in accord with the governing statutes.

²⁵ 31 U.S.C. § 3701(b)(1); *accord* 47 C.F.R. § 1.1901(e).

²⁶ 31 U.S.C. § 3711(a)(1).

²⁷ 31 U.S.C. § 3711(a)(2).

²⁸ 31 U.S.C. § 3711(a)(3).

collection agencies, reporting to credit reporting bureaus, and litigation or foreclosure.²⁹ Finally, unless Congress has specifically provided otherwise — which it has not — only the Director of OMB has authority to “settle” claims involving the Commission.³⁰

This statutory scheme makes clear that the Commission, like other federal agencies, is obliged to act on behalf of the fiscal interest of the Treasury (and the taxpayer) with respect to monies owed it. It must collect the funds owed it if at all possible, and it is authorized to compromise claims only in very limited circumstances. In essence, the FCC is a fiduciary for the U.S. taxpayer. It is not empowered to overlook or reduce legally binding financial obligations owed to it except in narrowly defined circumstances.

MCI, FortUNET, and GWI have asked the Commission to change the terms of financial legally binding obligations owed to the Treasury in ways that would reduce the economic benefit of those obligations to the government.³¹ These are clearly requests for the “compromise” of claims held by the government arising out of FCC programs. The Commission lacks the requisite authority to grant the requests.

Under Title 31, the Commission has a duty to the U.S. taxpayer to collect the claims that are owed when they are owed. The Commission may not even suspend a payment obligation, as it did on March 31, unless the licensee is unable to pay.³² Accordingly, the C and F block licensees are obliged by law to make their payments in accordance with their promissory notes. If they fail to

²⁹ 31 U.S.C. § 3711(g)(9).

³⁰ 31 U.S.C. § 3702(a)(4).

³¹ MCI and FortUNET seek changes in the payment schedule that would leave the principal amount of debt unchanged, but would lessen the net present value to the government of the stream of payments. GWI similarly seeks changes to the payment schedule, but would also reduce the principal owed to the government from an average of \$40/pop to \$15/pop. *See Public Notice* at 2 n.6. GWI has also asked the Commission to extend the payment term to fifteen years and to eliminate some or all of the interest payments.

³² *See* 31 U.S.C. § 3711(a)(3).

pay, taking into account the applicable grace periods, they are in default. In that case, they forfeit their licenses and the Commission is obliged to undertake collection efforts in accordance with the procedures set forth in 31 U.S.C. § 3711(g).

The D.C. Circuit has observed that “it is beyond cavil that ‘an agency’s power is no greater than that delegated to it by Congress.’”³³ Nowhere is this limit on the Commission’s authority clearer than in the case of funds owed to, or appropriated by, the government. As discussed above, Congress has placed strict limits on the Commission’s ability to forego revenues legally owed to the government.

The generation and disposition of federal revenues is among the most carefully guarded perquisites of Congress. Accordingly, the Commission may not reduce the amount of funding that is to come from a completed auction unless Congress has specifically authorized such action. Congress has not done so. When Congress passed the 1993 Budget Act, it required the FCC to use competitive bidding for the award of certain licenses for radio spectrum.³⁴ The decision was based, in part, upon the recognition that competitive bidding would provide a “source of revenues”³⁵ to service the federal deficit which could produce “significant economic returns.”³⁶ Indeed, one purpose of the spectrum auctions is “to generate revenue to reduce the deficit,”³⁷ even though the

³³ *Railway Labor Executives’ Ass’n v. National Mediation Board*, 29 F.3d 655, 670 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 115 S.Ct. 1392 (1995) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)).

³⁴ Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, 107 Stat. 312, 388-97, § 6002 (1993), *codified at* 47 U.S.C. § 309(j).

³⁵ H. Rep. No. 111, 103d Cong. 1st Sess. 247 (1993).

³⁶ H. R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 473 (1993) (quoting House bill findings, incorporated by reference by the conferees of the Conference Agreement).

³⁷ “Wireless Story of 1994: Broadband, Narrowband PCS Auctions,” *Advanced Wireless Communications*, No. 1, Vol. 6 (Jan. 4, 1995).

Commission is not permitted to base its auction decisions on revenue generation potential.³⁸ Congress, however, has made clear that it sees spectrum license auctions as an essential element of its budgeting and appropriation process. In fact, the House Commerce Committee acted to expedite the C Block auction specifically for the purpose of fulfilling its budget reconciliation requirements.³⁹

Congress has never authorized the Commission to waive or postpone revenue raised during the C and F Block auctions. While Congress gave the Commission some flexibility to determine how to structure the auctions and payments,⁴⁰ it has never given the Commission statutory authorization to forego auction revenues once obligated, thereby jeopardizing funds counted on to finance the federal deficit, and, indeed, Title 31 specifically bars the Commission from doing so.

The MCI, Fortunet, and GWI requests would result in the non-payment of billions of dollars in obligations to the U.S. Treasury. Cook Inlet remarks that the MCI proposal alone “amounts to a give-away of several billion dollars in government obligations,” and if all three were granted, the American taxpayer would have to pay as much as \$10 billion to make up for the revenue lost through the giveaway.⁴¹ For the reasons stated, this relief is barred by law.

B. Due Process and Fundamental Fairness Require the Commission to Follow Its Rules and Bar Alteration of the Auction Price After the Fact

The Commission’s duty to act consistent with due process of law requires it to ensure that its proceedings are conducted in a fair manner, particularly when the proceeding involves

³⁸ See 47 U.S.C. § 309(j)(7); *see also* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 485-86 (1993).

³⁹ See “House Commerce Committee Passes Measure Requiring FCC to Begin C-Block Auction by Dec. 4,” PCS Week, No. 36, Vol. 6 (Sept. 20, 1995).

⁴⁰ See 47 U.S.C. § 309(j)(3), (4); *see also* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 482-84 (1993).

⁴¹ Cook Inlet Petition at 5-6.

“conflicting private claims to a valuable privilege.”⁴² Acting consistent with “fundamental fairness” requires that the Commission give “full and explicit notice” of its requirements before binding members of the public to those requirements.⁴³ Thus, the D.C. Circuit has held:

It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.⁴⁴

The corollary of this principle is that when the Commission does give fair and explicit notice of its rules, the public is entitled to rely on those rules and the Commission is bound to follow them.

In this case, the FCC set up rules and policies that went to the core of the auction process and said it intended to enforce those rules strictly. The Commission, having conducted a series of auctions, now asks for comment on whether it should depart from those rules and policies, upon which hundreds of bidders relied. The proposals that have been noticed for comment include changes that would effectively alter the price the C and F block winners must pay by radically altering the installment payment schedule and interest rate. For the reasons that follow, such action would be contrary to law and the public interest.

Once the Commission has adopted rules that give adequate notice of its requirements and parties rely on those requirements, fundamental fairness requires the Commission to follow those rules.⁴⁵ “The agency's obligation to follow its own procedural rules exists to protect the rights of

⁴² *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

⁴³ *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985); see *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 329 (1994); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

⁴⁴ *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), cert. denied, 429 U.S. 895 (1976) (quoted in *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987)).

⁴⁵ *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 389-90 (1932); accord *Goncalves v. INS*, 6 F.3d 830, 833 (1st Cir. 1993); *Alegria I, Inc. v. FCC*, 905 F.2d 471, 474 (D.C. Cir. 1990); *In re Energy Resources Co.*, 871 F.2d 223, 230 (1st Cir. 1989), aff'd, 495

those . . . who deal with the agency. Therefore it is an obligation to follow their spirit as well as their letter.”⁴⁶ Moreover, when the Commission does *not* follow its rules, it is “fatal to the deviant action.”⁴⁷ Even when the rule appears to be discretionary, the agency is bound to follow it when the public relied on it.⁴⁸

Here, the Commission adopted rules that gave bidders full and explicit notice of the installment payment requirements that a winning bidder would incur. Bidders relied on the rules in deciding how to proceed in the auction, and some potential bidders decided not to participate (or were unable to do so) based on the rules. Some bidders dropped out of the auction rather than oblige themselves to comply with these requirements, while others won licenses that were contingent on fulfillment of the payment obligations. Under these circumstances, fundamental fairness and due process of law require the Commission to require the winning bidders to comply with the installment payment obligations established by the rules in effect at the time of auction.

These rules were established in a public notice-and-comment rulemaking. There were numerous comments at various stages in the proceeding regarding the installment payment rules, and those rules were modified several times based on the record developed.⁴⁹ The Commission is

U.S. 45 (1990); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C.Cir. 1986).

⁴⁶ *Mervin v. FTC*, 591 F.2d 821, 829 (D.C. Cir. 1978).

⁴⁷ *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992) (internal quotation marks omitted) (*quoting Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) and *Union of Concerned Scientists v. Atomic Energy Comm’n*, 499 F.2d 1069, 1082 (D.C. Cir. 1974)).

⁴⁸ “The use of the term ‘may’ does not . . . exempt an agency from its obligation to follow its rules or policies upon which the public justifiably has come to rely.” *Cardoza v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985).

⁴⁹ *See Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket 93-253, *Notice of Proposed Rulemaking*, 8 F.C.C.R. 7635, 7645, 7647-48 (1993); *Second Report and Order*, 9 F.C.C.R. 2348, 2389-91, 2395, *recon.*, *Second Memorandum Opinion and Order*, 9 F.C.C.R. 7245, 7263-64 (1994); *Fifth Report and Order*, 9 F.C.C.R. 5532, 5591-94, *recon.*, *Fifth Memorandum Opinion and Order*, 10 F.C.C.R. 403, 458-60 (1994); *Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 11872, 11884 (1995); *Sixth Report and Order*, 11 F.C.C.R. 136,

not free to change these rules after the fact, once parties have shaped their conduct in reliance on them. The Commission is “bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect.”⁵⁰

When the Commission established the installment payment rules in its competitive bidding proceeding, it made clear that strict enforcement of those payment rules was critical to the success and integrity of the auction scheme. If nothing else, it is essential to ensure fairness to those licensees who are not eligible for installment payments and must pay the entire auction bid price upon receiving a license. The C and F block winners have already been given economic concessions, in the form of bidding credits and below-market installment payment plans. If the Commission does not hold the C and F block winners even to these favorable terms, it would literally discard the results of the auction. The Commission emphasized the importance of enforcing the payment rules for all auction winners in its *Second Report and Order*:

[I]t is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on a balance due. We therefore are adopting penalties to be assessed in the event of default or disqualification. These penalties will provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.⁵¹

156-59 (1995); see also *Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket 96-59 & GN Docket 90-314, *Report and Order*, 11 F.C.C.R. 7824, 7841-46 (1996); *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding*, WT Docket 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, FCC 97-60, at ¶¶ 32-38 (Mar. 3, 1997).

⁵⁰ *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 389 (1932).

⁵¹ *Second Report and Order*, 9 F.C.C.R. at 2382 (footnote omitted).

The Commission recognized that making the payment terms too easy would raise prices unnecessarily and encourage speculation, to the detriment of serious, responsible bidders:

Reducing or eliminating interest payments could result in very high bids, which could reduce competition and promote defaults among entrepreneurs. Such an approach could also encourage speculation instead of legitimate applicants who can attract capital.⁵²

In March 1996, in the middle of the C block auction, Chairman Hundt alluded to these high-flying bidders who “believe that the FCC will forgive the down payment due when the auction is over, and even may forgive the principal payments which begin six years later” and made clear that no such relief would be forthcoming.⁵³

Despite the Commission’s express indication that it did not intend to encourage speculators and the Chairman’s warning that they could not expect the Commission to rescue them from themselves, the speculators and irresponsible bidders are now back seeking to get the very help they have been told to forget about, and more. The Commission was right not to adopt payment terms that would encourage speculators, and it should likewise not reward the speculators who nevertheless participated in the auction with more favorable terms and prices than they bargained for.

The postponement of interest and principal payments that MCI and Fortunet propose would fundamentally change the economic bargain established at the auction. MCI candidly admits that its payment plan would reduce the net present value of the licensees’ obligations to the government substantially,⁵⁴ and the same is true of Fortunet’s proposal. GWI goes even farther and asks that the principal amount of its note be reduced dramatically, as well as making the payment terms more

⁵² *Fifth Memorandum Opinion and Order*, 10 F.C.C.R. at 460

⁵³ *See* note 3, *supra*.

⁵⁴ *See* Chart 2 attached to the Sawicki letter.

favorable.⁵⁵ These companies are asking the Commission to write off valid financial obligations owed to the U.S. Treasury, even though these obligations were the high bids at a public auction, simply because the licensees (or foreign-owned companies seeking to acquire licensees) would privately benefit from a handout. The Commission should reject these entreaties.

The existing installment payment plans were carefully crafted to provide reasonable assistance to entrepreneurs of various sizes without encouraging speculation. The Commission should do no more. Changing the payment plan after the auction in a way that alters the fundamental economic bargain that came out of the bidding would amount to cutting the prices after the auction.

C. The Commission May Not Change the Fundamental Economic Bargain Established at the Auction By Granting Waivers

It is well established that the FCC may only grant a waiver of its rules when it has articulated a non-discriminatory waiver policy and grant of the waiver will not undermine the purpose of the rule or program.⁵⁶ The MCI, FortUNET, and GWI waiver requests do not meet these standards and therefore cannot be granted.

In general, the FCC has authority to waive its rules if there is “good cause” to do so.⁵⁷ Courts have held, however, that those waivers must be founded upon an “appropriate general standard” so as to avoid “discriminatory approaches.”⁵⁸ Moreover, the agency is charged with explaining “why deviation better serves the public interest and articulat[ing] the nature of the special circumstances

⁵⁵ See GWI Proposal.

⁵⁶ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (holding that the FCC can only grant waivers where it has articulated reasons for doing so); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert denied* 403 U.S. 923 (1971).

⁵⁷ 47 C.F.R. § 1.3.

⁵⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

to prevent discriminatory application.”⁵⁹ The Commission’s PCS rules specifically provide that a waiver is appropriate only when a party demonstrates that either: (1) the underlying purpose of the rule will not be served or would be frustrated by its application in a particular case, and that grant of the waiver is otherwise in the public interest, or (2) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.⁶⁰

MCI has requested, *inter alia*, that the Commission waive its rules to allow C block licensees to defer payment and accrue interest for the first five years of the license term.⁶¹ Fortunet has similarly asked the Commission to suspend interest payments until year five of the license term.⁶² GWI goes even further. All of these waiver requests fail to meet the standards for waiver established by the courts or the FCC’s rules.

Grant of the MCI, Fortunet, and GWI waiver requests would undermine the integrity of the auction process by directly changing the economic bargains that resulted from the auctions. After-the-fact waivers of this kind are discriminatory *per se*. Grant would directly penalize those who relied upon the rules as they stood prior to and at the time of the PCS auctions.

Any process used to assign spectrum must be scrupulously fair and even-handed. When auctions are used, this is even more true, because companies have made multimillion-dollar commitments, and deviations from evenhandedness relating to the economic terms of the auction have the effect of subsidizing one competitor over another contrary to the established rules.

⁵⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁶⁰ 47 C.F.R. § 24.819(a)(1)(i), (ii); *Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules*, Order, DA 97-891 (released April 28, 1997); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

⁶¹ See Sawicki Letter at 1-3.

⁶² See Barker Letter at 3.

Procedural and administrative fairness is important for auctions because the rules that are in place are relied upon to define how much a company will bid, what its bidding strategy will be, how it will structure its business, and so forth. Accordingly, strictly following well-established ground rules is essential if the auction is to have integrity.

Recently, the Commission found that it was essential to follow its auction-related rules strictly, stating that a “strict standard is necessary to ensure that applicants are treated fairly and equally,” and waivers would “vitiate” the standards contained in the rules.⁶³ The Commission has repeatedly noted that the integrity and functioning of the auction process is dependent on having payment obligations on winning bids promptly met.⁶⁴ The overall effect of waiving installment payment rules for five years for parties that do not have the funds to meet such deadlines “would be a disruption to the auction process and a delay in service to the public generally.”⁶⁵

The MCI/Fortunet/GCI requests to put off installment payments — even interest payments — will reward licensees who are unable or unwilling to satisfy their debt obligations. MCI essentially admits this in its letter:

The entrepreneurs can be a strong and vital competitive force in the emerging wireless market *if* they can begin operations and develop a cash-producing business. *This is nearly impossible if they must spend most of the money they raise on debt service and license payments, instead of building revenue-producing networks with competitive footprints and aggressive marketing.*⁶⁶

⁶³ *First Auction of Interactive Video and Data Service (IVDS) Licenses (Request for Waiver of Applications Deadline)*, 11 F.C.C.R. 1134, 1135 (1996) (*aff'g and quoting* 10 F.C.C.R. 5415 (WTB 1995)).

⁶⁴ *See National Telecom PCS, Inc.*, FCC 97-192 at ¶ 14 (June 19, 1997); *BDPCS, Inc.*, 12 F.C.C.R. at 3234; *RFW, Inc.*, 12 F.C.C.R. 1536, 1537-38 (1997).

⁶⁵ *See Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, Order*, DA 97-891, at ¶ 8 (released April 28, 1997).

⁶⁶ Sawicki Letter at 2 (emphasis added).

This statement indicates that the subject licensees are not able to both make the required payments and provide new services expeditiously, despite the fact that the FCC's payment rules are designed to ensure that auction winners have the necessary resources to deploy services quickly.⁶⁷

The Commission has made clear that waivers of rules that affect auction participation are inappropriate even *before* the auction.⁶⁸ Waivers of auction-related rules *after* the end of the auction are even more destructive of a fair and equitable auction, because they favor those either not wishing or unable to comply with the rules on which the auction was premised. The rules already include a relief mechanism for those unusual situations where a licensee is unable to meet an installment payment obligation, and no more relief is needed. The Commission provided for the availability of a narrow grace period of relief for a licensee that is delinquent on its installment payment obligations,⁶⁹ but its rules make clear that if the grace period expires without payment, "the license will automatically cancel and the Commission will initiate debt collection procedures."⁷⁰ Waiver of these rules would gut the underlying policy behind enactment of the rules themselves, and thus should be rejected by the Commission.

The MCI waiver request was not filed by a C block winner. MCI holds contingent interests in NextWave, a major C block winner that paid very high prices. Perhaps to divert attention from the fact that MCI stands to benefit substantially from a "waiver" that would grant a multimillion-dollar windfall to NextWave, MCI urges the Commission to grant waivers to *all* C block licensees asking for them. By their very nature, if waivers are routinely available to all comers, the rules are

⁶⁷ See *Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules*, Order, DA 97-891, at ¶ 10 (released April 28, 1997).

⁶⁸ *First Auction of Interactive Video and Data Service (IVDS) Licenses (Request for Waiver of Applications Deadline)*, 11 F.C.C.R. 1134, 1135 (1996) (*aff'g and quoting* 10 F.C.C.R. 5415 (WTB 1995)).

⁶⁹ See 47 C.F.R. § 1.2110(e)(4)(ii).

⁷⁰ *Id.*, § 1.2110(e)(4)(iii); see also *Second Report and Order*, 9 F.C.C.R. at 2391.